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Chairman: Mr. Enkhsaikhan ..... (Mongolia)

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The meeting was called to order at 10.15 a.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*) (A/53/10 and Corr.1)

1. **Ms. Škrk** (Slovenia) said that the distinction between State responsibility for international crimes and international delicts was a core issue which the International Law Commission must resolve. The concept of State crimes, including the legality of the use of force in cases of aggression, was one of the most fundamental questions of international law. The category of international State crimes as wrongful acts with legal consequences beyond those of international delicts should be retained in the Commission's future text on State responsibility. Failure to do so would amount to denial of reality in contemporary international relations and would impoverish the process of codification and the progressive development of international law on State responsibility.

2. International crimes fell under international law or State responsibility; therefore, any comparison with the criminal responsibility of natural or legal persons under internal law could be misleading. State responsibility for international crimes should not involve any criminal responsibility; however, because the consequences of State crimes were far more serious than those of international delicts, the Commission should establish separate consequences for those two acts. The objection that international State crimes were not terminologically distinct from international crimes committed by natural persons was unconvincing since the same objection could be raised in the case of international delicts on the grounds that in many internal legal systems, the term "delict" was used to denote a criminal act committed by an individual. International crimes, as envisaged by the Commission, entailed a violation of obligations *erga omnes* that were in the interests of the international community as a whole. Some international crimes, such as aggression or genocide, could also be characterized as breaches of *jus cogens* norms of international law. While her delegation was not opposed to substitution of the term "exceptionally serious wrongful acts" for that of international crimes, it believed that, for practical reasons, the latter concept should be retained. If so, the Commission should reexamine that concept in the light of new developments in international law concerning grave and massive violations of human rights that entailed the responsibility of States.

3. In 1997, her delegation had presented its views to the Committee on the draft articles on the nationality of natural persons in relation to the succession of States and had agreed with the Special Rapporteur that, in the case of the dissolution of a State, the principle of continuity of the secondary nationality, which was the one attributed to an individual by the former federal unit, should prevail over the principle of permanent residency as a criterion for the acquisition of the nationality of a successor State. That principle should apply where the predecessor State was a federation and where, along with nationality within the meaning of international law, the power to grant internal nationality was vested in the federal unit; that had been the consistent practice of successor States emerging from the former Czech and Slovak Federal Republic and the former Socialist Federal Republic of Yugoslavia.

4. Her Government had always maintained that the nationality of legal persons in relation to the succession of States was an important matter; some treaty practice and jurisprudence in that respect originated from treaties concluded after the First World War and should therefore be updated. It would be useful for the Commission to prepare an instrument, perhaps in the form of a declaration, that would establish the basic principles applicable to legal persons not directly linked to States or State entities. The primary issue was to determine how a successor State, in respect of its nationality, treated legal entities within its territory or under its jurisdiction or control that possessed the nationality of the predecessor State in the absence of agreement among the States concerned. That instrument might include a clause urging the States in question to negotiate and cooperate in good faith in order to resolve such problems. The topic should basically be limited to legal problems connected with the nationality and legal capacity of legal entities affected by the succession of States, including perhaps a safety clause confirming the preservation of the property rights of such entities. Any other attempt to protect the property or property rights of legal persons would involve the issue of diplomatic protection or the law on the succession of States in general. It must be borne in mind that article 6 of the 1983 Vienna Convention on Succession of States in respect of State property, Archives and Debts already included a safety clause preserving the property and property rights of natural and legal persons in cases of the succession of States.

5. With regard to reservations to treaties, her delegation fully agreed with the presentation made by the Special Rapporteur on the basis of the existing Vienna regime. The current text of the draft guidelines with commentaries was well balanced and would serve as a basis for the Commission's future work. In 1997, her delegation had maintained that interpretative declarations constituted

unilateral acts of States; however, the explanation that they formed an inevitable part of treaty law was convincing, and her delegation had no objection to the Commission's current approach to that question. Her delegation had noted with satisfaction that the Special Rapporteur had envisaged the possibility that a successor State might make a reservation at the time of notification of succession to a treaty, as established in the 1978 Vienna Convention on Succession of States in Respect of Treaties. That approach confirmed the successor State's right to repeal a reservation made by the predecessor State, or to make a new reservation of its own, in assuming the latter's obligations under that treaty. It must be borne in mind that, while the successor State became party to a treaty as from the date of succession, reservations to treaties became effective upon notification of succession; in practice, considerable time might elapse between those two dates.

6. **Mr. Šmejkal** (Czech Republic) said that his delegation had followed with great interest the work of the Commission on State responsibility, and trusted that it could quickly move towards conclusion of the second reading of the draft articles. With respect to general questions, the provisions on countermeasures would find their proper place in the articles relating to State responsibility, since strictly speaking they were not considered a right of an injured State but one of the circumstances precluding wrongfulness, and were a corollary to the settlement of disputes relating to the exigency of responsibility. The topic must be carefully considered in second reading so as to strengthen the guarantees available under international law.

7. The final content of the provisions on the settlement of disputes would largely depend on the manner in which the draft articles were adopted. Consideration should be given to the adoption of a final text in the form of a declaration setting forth only some of the fundamental principles of State responsibility, which would subsequently be complemented by a convention, although it might be more difficult than anticipated to extract guidelines from the text of the articles.

8. With regard to the distinction between crimes and delicts, his delegation considered that State responsibility in international law was neither civil nor criminal, but international. The Commission had clearly set aside the "criminal" approach to the notion of State crimes, since it encountered insurmountable obstacles, largely the difficulty of applying national criminal law to relations between sovereign States. "To criminalize" State responsibility was merely a theoretical exercise, although naturally that did not preclude the imputation of international criminal responsibility through the mechanism of ad hoc tribunals or the future International Criminal Court to individuals having committed international crimes.

9. It was not essential to use the terminology "delicts" and "crimes" to distinguish between wrongful acts and exceptionally serious wrongful acts, but his delegation had always been in favour of maintaining the fundamental distinction. A unified regime on responsibility would make it impossible to guarantee that certain particularly serious consequences arose solely and exclusively from the breach of norms protecting the fundamental interests of the international community. Undifferentiated responsibility referring, at one extreme, to a minor breach of treaty obligations and, at the other, to acts contrary to the fundamental interests of the international community, could, through its very flexibility, serve to diminish the importance of exceptionally serious breaches of international law.

10. Moreover, the consequences of the "crimes" covered by the draft articles seemed relatively modest, which raised the question of whether the distinction between the two categories of wrongful acts was justified. The Commission might use the second reading of the draft to review the characteristics of exceptionally serious wrongful acts with regard not only to Part Two of the draft articles but also Part One, which, in actual fact, had been drafted with a unified regime approach. The Commission's provisional conclusions indicated a desire to conduct such a review. The fact that such consideration had been conducted not on the basis of the notion of "exceptionally serious wrongful acts" but, rather, on the basis of the specific characteristics of obligations *erga omnes* and obligations arising from peremptory norms (*jus cogens*) and, within the latter category, of "crimes", might be more relevant and useful for the structuring of the regime on international State responsibility.

11. His delegation saw no reason within the topic of State responsibility to draw a distinction between *jure gestionis* and *jure imperii* acts. The distinction was irrelevant in terms of attributing conduct to a State and must not be used to limit in any way the responsibility of a State having committed an internationally wrongful act. Enjoyment, where appropriate, of jurisdictional immunities had nothing to do with the issue of responsibility, which could be determined by means other than recourse to foreign courts. Lastly, the balance between the various provisions of chapter II of Part Two would be improved if the content of the articles on compensation and guarantees of non-repetition was broadened by incorporating, in particular, certain norms of customary international law which had entered into international jurisprudence.

12. **Mr. Al-Baharna** (Bahrain) reviewed the various topics in chapter III of the Commission report, and commented on topics in chapters IV, V, VI, VII, VIII and IX. In connection with international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (chap. IV), he noted that at the 1998 session the Commission had decided to revert to its consideration of the 17 draft articles on the prevention of transboundary damage and to delete those which were most closely related to the question of liability. He commented on some of the articles in the 1998 text, and concluded that the text was much preferable. Nevertheless, the draft articles on prevention would be meaningless if some form of responsibility for failure to comply with the obligation of prevention were not established. It was regrettable that there had been no progress in defining the scope of the regime on liability. It would be reasonable for failure by the State or agent to comply with the obligation to prevent damage to give rise to civil liability and not State responsibility; it would be for the Commission to determine those consequences and to establish compensatory measures in cases where transboundary harm was not prevented.

13. With regard to the topic of diplomatic protection (chap. V), codification of the principles of international law should be limited to codification of the secondary rules dealing with the consequences of diplomatic protection. It was a discretionary right of the State, not the individual, and should continue to be considered as such. As for the fact that some States in Europe had attributed the right of diplomatic protection to their nationals on the basis of domestic legislation, the Special Rapporteur had stated that the obligation was moral rather than legal. It seemed clear that, under customary international law, diplomatic protection could be invoked by a State on behalf of its nationals only after local remedies had been exhausted. He agreed that human rights and diplomatic protection should be considered as separate topics, although it could not be denied that there was a link between them. In short, he endorsed the conclusions of the Working Group on the topic, which were set out in paragraph 108 of the report.

14. Regarding unilateral acts of States (chap. VI) he supported the suggestion by the Special Rapporteur that the Commission should focus on unilateral declarations, leaving aside other, broader categories unilaterally expressing the will of States, such as political unilateral acts, unilateral legal acts by international organizations and acts and conduct by States which, while voluntary, had not been intended to produce specific effects in international law. He also agreed with the Special Rapporteur that, for the time being, the topic should not include unilateral acts of States directed at other subjects in international law. As for the final form of the Commission's work, the study of the topic should take the form of draft articles with commentaries.

15. With regard to the topic of nationality in relation to the succession of States (chap. VII), his delegation preferred the second option suggested by the Working Group of keeping the study within the context of the succession of States, while including other questions such as the status of legal persons. He agreed with the Special Rapporteur that if States did not submit positive comments, the Commission would have to conclude that they were not interested in the second part of the topic.

16. With regard to chapter IX of the report (Reservations to treaties), the crux of the matter was to distinguish between reservations and other unilateral statements made with respect to a treaty, for example, interpretative declarations. In introducing the draft guidelines on reservations to treaties, the Special Rapporteur had stated that the definition of reservations that had been adopted was none other than the composite text of the definitions contained in the Vienna Conventions. In his view, that definition left room for some degree of uncertainty.

17. Commenting in greater detail on the draft, he said that the aim of guideline 1.1.1 (Object of reservations) was to take account of so-called "across-the-board" reservations, although it was assumed that such reservations did not concern the exclusion of the entire text of a treaty and, as such, could not give rise to any particular objection. It could therefore be argued that the guideline related to an across-the-board reservation which concerned not the entire text of the treaty, as that was prohibited under the Vienna definition, but the way in which a State intended to implement the treaty as a whole. As currently drafted, however, the guideline could give rise to confusion between reservations and interpretative declarations. His delegation believed that guideline 1.1.2 was a saving clause for guideline 1.1. As to guideline 1.1.3 (Reservations having territorial scope), his delegation was inclined to regard such statements as genuine reservations under the Vienna Conventions, as their object was to partially exclude or modify the application of a treaty in the territory of the formulating State. His delegation did not concur with the commentary on the guideline, which stated that a territorial reservation could be formulated only if it was expressly provided for in the treaty to which it related; the Vienna Conventions did not admit such a restriction.

18. With regard to guideline 1.1.4, he agreed that a unilateral statement made by a State at the time of the

notification that the application of a treaty extended to a territory constituted a reservation. His delegation supported the provision contained in guideline 1.1.5, on the understanding that an "extensive" reservation, involving a unilateral commitment by the formulating State to go beyond what the treaty imposed on it was not a reservation within the meaning of the Vienna Conventions. Accordingly, he supported the argument of the Special Rapporteur contained in paragraph 524 of the report. With regard to guideline 1.1.7, he shared the view of the Commission that, while joint formulation of a reservation by a number of States could be made, it should not in any way affect the unilateral nature of such a statement.

19. His delegation understood that the additional guideline amounted to stating that the definition of a reservation and its permissibility were two different matters. In other words, a unilateral statement could be defined as a reservation which could later be judged to be impermissible, making it a futile exercise. Accordingly, the question of permissibility should be linked to the definition of the reservation. Lastly, chapter VII of the report (State responsibility) raised some fundamental questions which his delegation wished to study in greater detail.

20. **Mr. Leanza** (Italy), referring to the topic of State responsibility, said that the draft articles should examine not only the requirements for an act to be considered as internationally wrongful, but also the legal consequences of such an act and the dispute settlement procedures. His delegation attached special importance to the fact that the draft referred not only to substantive consequences, namely, the new obligations imposed on the State committing the wrongful act, but also to the countermeasures to be adopted with respect to that State and the conditions under which they were to be applied.

21. His delegation believed that a convention on international State responsibility for wrongful acts should include dispute settlement provisions. In his view, damage was not a constituent element of a wrongful act; he therefore fully endorsed the provisions of draft article 3.

22. He agreed that the draft should refer to State responsibility for exceptionally serious wrongful acts, or "international crimes", and not only to responsibility for ordinary wrongful acts, or "international delicts". Customary international law provided that a breach of certain obligations of fundamental importance for the international community directly infringed the subjective rights of all States and justified invoking the responsibility of the State which had breached those obligations; at issue were breaches of what the International Court of Justice had termed *erga omnes* obligations, including the obligation to refrain from acts of aggression. Customary law also drew distinctions with respect to legal consequences.

23. His delegation believed that the distinctions provided for in the responsibility regime should be codified, clarified and finalized in the draft. In addition, the special regime of responsibility for wrongful acts which harmed fundamental interests of the international community was not a domestic penal regime. The term "international crime" merely denoted the existence of a special scheme of responsibility with respect to the ordinary regime. Moreover, the Rome Statute establishing the International Criminal Court stipulated that it was only in such cases that reference to domestic penal instruments could be made.

24. With regard to Part One of the draft articles, he agreed that article 2 should be deleted, since the concept to which it referred was implicit in article 1, that article 6 and article 7, paragraph 1, should be recast as a single provision (art. 5), and that a new article 8 *bis* should be included. He also endorsed the deletion of articles 11 to 14, which merely stipulated that a given conduct was not attributable to a State except as otherwise provided in other articles. The drafting of article 15 was appropriate, and article 15 *bis* had filled a major lacuna in the 1996 draft, referring to cases in which the State adopted or acknowledged individual conduct as its own conduct.

25. With regard to the possibility of attributing responsibility to a State for any conduct, regardless of whether what was involved was an activity of *jus gestionis* or *jus imperii*, his delegation believed that no importance was attached to that distinction in international practice and jurisprudence. In addition, it was frequently difficult to distinguish between *jure gestionis* and *jure imperii* acts.

26. With regard to the balance between general principles and more detailed provisions, it was especially important to establish principles concerning the consequences of an internationally wrongful act that would be sufficiently acceptable. The more detailed provisions would ensure greater legal security in so sensitive an area as that of international responsibility.

27. With regard to chapter X of the report, he supported the criteria for selecting the topics to be included in the long-term programme of work. He was also of the view that the Commission should not limit itself to traditional topics, but should also consider questions that were more in tune with recent changes in international law and with the most pressing concerns of the international community.

28. **Mr. Pal** (India) said, with reference to diplomatic protection, that the initial outline drawn up for the study of the topic and the preliminary conclusions of the Working Group were worthy of careful consideration. One important aspect was the new emphasis being placed on the rights of the individual and the principle of exhaustion of local remedies.

29. He recognized that unilateral acts had legal effects, particularly insofar as they created obligations for the State performing such acts, and expressed agreement with the Special Rapporteur that unilateral acts represented a source not of international law but of international obligations. The Special Rapporteur had recommended that acts of international organizations, which were merely expressions of political support or cooperation and were not intended to give rise to legal obligations, could be excluded. His delegation believed that acts of States that were clearly regulated by treaty law or the law of State responsibility should also be excluded. By contrast, the legal effect of estoppel should be included. The conditions under which obligations created by unilateral acts could be revoked should also be studied. Before the Special Rapporteur could submit a set of draft articles on the topic, the principles governing unilateral acts should be given a clear, uniform and generally acceptable formulation.

30. He applauded the progress made by the Commission in its second reading of the draft articles on State responsibility. Despite the urgency of completing the task before the end of the current quinquennium, it was important that the second reading should be based on a wide consensus among all States. The legal formulation of the law of State responsibility was, after all, only a means to an end, that of promoting a universal, equitable and just world order.

31. The Commission had made rapid progress on draft articles 1 to 15, which dealt with questions concerning the attribution of State responsibility. With regard to the basic point that such responsibility would give certain rights to the injured State, it had been right to draw a distinction between legal injury and material damage. In that context, it was important to clarify the notion of an injured State as contained in draft article 40, particularly in relation to *erga omnes* obligations, *jus cogens* and State crimes. Responses to violations of community obligations should be graduated according to the proximity of a State to the breach of which it was a victim. The important point was to recognize that designating all States as "injured" and granting them a full range of responses to "crimes", including the right to take countermeasures, could lead to abuse. States generally should be discouraged from seeking self-help mechanisms to serve their special interests in the name of defending the interests of the international community.

32. He agreed with the concept of State crime set out in draft article 19, particularly crimes involving colonialism, apartheid or aggression, which were no less serious for being less frequent than in the past. Moreover, differentiating State crime from the notion of criminal responsibility under national law had the merit of discouraging States from promoting, financing or planning to commit crimes through mercenaries or by proxy. Terrorism financed or practised by a State by proxy should be treated as a State crime which deserved a coordinated and measured response from the international community. He therefore urged the Commission to retain the concept of crime as defined in draft article 19. In that connection, his delegation noted the Commission's interim conclusions on draft article 19, indicated in paragraph 331 of the report.

33. The subject of reservations to treaties had attracted growing interest and had been the subject of a meeting of the Asian-African Legal Consultative Committee held in New Delhi in April 1998. A report of the meeting had been submitted to the Commission.

34. His delegation welcomed the consensus in the Commission on the preparation of a Guide to Practice on reservations that did not disturb the Vienna regime. No distinction should be made between human rights treaties and other multilateral treaties, since the Vienna Convention obviously did not do so. His delegation therefore looked forward with particular interest to the Special Rapporteur's analysis regarding inadmissible reservations and objections to such reservations. Meanwhile it welcomed the draft guidelines on reservations to treaties provisionally adopted by the Commission at its fiftieth session.

35. With regard to nationality in relation to State succession, the Commission should concentrate on the draft articles on natural persons before deciding on the desirability of pursuing the question of the nationality of legal persons, which raised quite separate issues.

36. **Mr. Yin Yubiao** (China) said that State responsibility was composed of three major elements: the existence of an internationally wrongful act, the attribution of that act to a State, and the consequences thereof. An act of State that did not violate international law but produced injurious consequences should be considered in the context of another topic, International liability for injurious consequences arising out of acts not prohibited by international law.

37. The Commission had improved the text of the draft articles currently being considered on second reading. His

delegation agreed to the deletion of the original draft article 2, which stated that any State might be presumed guilty of internationally wrongful acts. As the Special Rapporteur had explained, that draft article expressed a truism and did not directly touch upon State responsibility but only referred to the possibility of such responsibility. Moreover, a State should be presumed to abide by the law, in good faith; that would eliminate some procedural consequences such as burden of proof. An explanation might be included in the commentary on the draft article.

38. In draft article 5, the Drafting Committee had deleted the phrase "under the internal law of that State" after the words "any State organ having that status", on the grounds that reference to internal law in isolation could be misleading since practice and custom were also decisive factors. His delegation believed that it was inappropriate to delete the phrase in question, since internal law was of primary importance in defining the organs of a State and its definition could cover both practice and customs. He agreed that draft articles 13 and 14 should be subsumed into article 15, "Conduct of insurrectional and other movements".

39. With regard to draft article 19, it was unrealistic to introduce the concept of State crime, since the international community was made up of States with equal sovereignty and there was no organ with criminal law jurisdiction over a State. It was also difficult to comprehend that a State that included people in a collective sense could be indicted. Those in favour of including State crime argued that the word "crime" in the law governing State responsibility expressed an exceptionally serious wrongful act that was condemned by the entire international community and caused exceptionally serious judicial consequences. It could therefore not be explained in a criminal law sense. Moreover, the word "crime" could not be stripped of its usual meaning.

40. Acts of aggression or other acts which seriously violated international law were a matter of individual responsibility, as manifested by international practice in the cases of the Nürnberg, Tokyo, former Yugoslavia and Rwanda tribunals. The International Criminal Court currently being established could also investigate the criminal responsibility only of individuals. Moreover, there was ample evidence that in current international practice so-called "State crimes" did not exist. State responsibility could only be civil, not criminal. His delegation therefore suggested that draft article 19 and related articles in Part Two should be deleted.

The meeting rose at 12.10 p.m.